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NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOHN CHRISTIAN MCBRIDE, Defendant and Appellant.	E028564 (Super.Ct.No. PEF003360) O P I N I O N

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela A. Ratner, Supervising Deputy Attorney General, and Marilyn L. George, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, defendant John Christian McBride was convicted of assault with a deadly weapon other than a firearm (Pen. Code, § 245, subd. (c)[1]), resisting arrest (§ 148), false representation (§ 148.9, subd. (a)), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), driving a vehicle while under the influence of alcohol and a drug (Veh. Code, § 23152, subd. (a)), and driving a vehicle with a blood alcohol level of .08 percent or higher (Veh. Code, § 23152, subd. (b)). In a bifurcated trial, the court found true the prior conviction allegations (§§ 1170.12, subd. (c), 667, subds. (a), (c), & (e) & 667.5, subd. (b)). Defendant was sentenced to state prison for a total prison term of 14 years.

PROCEDURAL BACKGROUND AND FACTS

At approximately 9:00 p.m. on October 1, 1999, Riverside County Sheriff's Deputies Gary Shelton and Bruce Moore were patrolling the Quail Valley area when they noticed a jeep exceeding the speed limit. Upon pulling the jeep over, they noted defendant driving with two juvenile passengers, Travis and Natalie. Upon confronting defendant, the deputies observed signs of defendant being under the influence. Defendant identified himself as John Johnson but did not have any identification with him.

Deputy Tim Elwell is the only deputy assigned to Quail Valley on a full-time basis. On that evening, he had Murrieta Police Officer Sandy Trevino riding along with him. They noticed the traffic stop and stopped to assist. Defendant was standing on the side of the road with the deputies. Deputy Elwell was familiar with defendant and knew his name was

[1] All further statutory references are to the Penal Code unless otherwise indicated.

not John Johnson. Knowing where defendant was staying, Deputy Elwell and Officer Trevino left the scene to pick up the owner of the house to identify defendant.

On the side of the road, Deputy Moore conducted a series of field sobriety tests on defendant which caused the deputy to opine that defendant was under the influence of both alcohol and a stimulant. Defendant and Travis were placed, unhandcuffed, in the back of the patrol car and a decision was made to arrest defendant for driving under the influence.

After the tow truck arrived at the scene, Deputy Shelton attempted to handcuff defendant who began arguing, saying that he had not done anything wrong. At first, defendant appeared to comply with the deputy, but then he suddenly turned, kicked the door open and rushed out of the car. According to Deputy Moore, defendant "spun out of the car and blew right past Deputy Shelton." Defendant pushed Deputy Shelton out of his way and began to run. The deputy grabbed onto defendant and got him down on the ground with his (the deputy's) chest on defendant's back and his right arm over defendant's right shoulder. Despite the deputy's repeated requests that defendant cease resisting, he continued to resist. Unable to reach his pepper spray, Deputy Shelton attempted a carotid restraint while his partner was trying to grab defendant's right arm.

Deputy Shelton thought that Deputy Moore must have dropped his flashlight because defendant began swinging a flashlight backwards over his left shoulder.[2] Utilizing his training, Deputy Shelton ducked his head behind defendant's head to avoid being hit.

[2] Deputy Moore did not realize it at the time, but it was his flashlight that defendant was swinging.

Deputy Moore was unable to get a hold of defendant's arm because he was "extremely strong."

After defendant took five or six swings at Deputy Shelton with the flashlight, the deputy managed to grab the flashlight with his left hand. There was a brief tug-of-war, then the deputy got it away. Defendant grabbed Deputy Shelton's right arm just above the wrist and started to pull. Afraid that defendant would flip him (the deputy) over his shoulder, the deputy hit defendant on the head two or three times with the flashlight causing defendant to let go. Defendant stood up with Deputy Shelton on his (defendant's) back. Deputy Moore pushed them both into a chain link fence 10 to 15 feet away, which partially collapsed under their weight.

Deputy Moore called for emergency backup as the struggle continued on the ground and partially on the fence. Feeling a "weightlessness" on his holster, Deputy Shelton thought defendant had grabbed his gun, so he yelled to his partner, "He's got my gun. Shoot him." Deputy Moore could see that defendant did not actually have the gun; however, defendant did have his hand on Deputy Shelton's holster. Deputy Shelton grabbed his baton with his left hand and began to jab or poke defendant in an attempt to get him to drop the gun. Deputy Moore grabbed defendant's hair with his left hand and pulled defendant's head backwards. At the same time, he managed to get defendant's right hand behind his back in a control hold. After Deputy Moore pulled defendant's right arm away from his partner's holster, he told his partner that defendant did not have the gun. Deputy Shelton thereafter stopped hitting defendant with the baton. The struggle continued with defendant kicking and

yelling, “Look at what they’re doing to me.” Deputy Elwell and Officer Trevino then arrived and assisted in handcuffing defendant.

Deputy Elwell later found Deputy Moore’s eyeglasses, handcuffs, watch, and flashlight near the location of the struggle. Unaware defendant had used the flashlight as a weapon, Deputy Elwell picked it up and handed it to Deputy Moore.

The tow truck driver, Douglas Carr, had lived in Quail Valley for several years and knew defendant as John. As Carr was waiting at his tow truck, he heard some noise from the patrol car and saw defendant tackled to the ground after he started to run. Carr could see the backs of the two deputies, but he could not see defendant because he was underneath the deputies. Carr never saw defendant holding anything, but he did hear one of the deputies say something about shooting defendant if they had to during the struggle.

Seventeen-year-old Travis testified that while he was being detained in the back of the patrol car with defendant, defendant said he was going to take off when the door was opened. Travis saw defendant attempt to get away, and saw the struggle with the deputies, but he said defendant never had the flashlight. Travis did see both deputies strike defendant with a flashlight.

The parties stipulated that if the prosecutor were called to the stand as a witness, he would testify that during a conversation on July 13, 2000, Deputy Shelton described defendant as having poked the flashlight at his head, and that during a conversation on July 17, Deputy Shelton described defendant as both swinging and poking the flashlight at his head.

DENIAL OF *PITCHESS* MOTION

Prior to trial, defendant filed a *Pitchess*[3] motion seeking discovery of the personnel records of the Deputies Shelton, Elwell and Moore, including any material evidence regarding the use of excessive force or violence in the performance of their duties as peace officers. A hearing on the *Pitchess* motion was held on March 10, 2000, with deputy county counsel appearing on behalf of the custodian of records from the Riverside County Sheriff's Department. The court indicated that it had read the motion and found there was "enough information to conduct an in camera" examination. Deputy County Counsel "reluctantly agree[d]." After conducting an examination of the deputies' personnel records produced, the trial court stated: "Let the record reflect that County Counsel and the custodian of records and I have just returned from chambers wherein I reviewed the personnel files of officers involved and concluded that there is no discovery information in any of those files."

On appeal, defendant asks this court to "independently review the sealed transcript of March 10, 2000 and the files reviewed in camera by the trial court in order to determine if the trial court abused its discretion in denying the motion and whether there was, in fact, discoverable information relevant to the issue of force used and credibility of the officers."

A criminal defendant has a limited right to discovery of peace officer personnel records based on the fundamental proposition that a defendant is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. (*City*

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3 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

of San Jose v. Superior Court (1998) 67 Cal.App.4th 1135, 1141.) An accused may compel discovery by demonstrating that the requested information will facilitate the ascertainment of facts and a fair trial. (*Ibid*.)

In order to obtain discovery of the personnel records of a peace officer, the moving party must submit affidavits showing "good cause" for such discovery and setting out the materiality of the information requested. (Evid. Code, § 1043, subd. (b).) Under *Pitchess*, a defendant demonstrates good cause for discovery when the defendant shows the information requested is (1) relevant to a defense of self-defense, (2) necessary in that defendant could not readily obtain the information through his own efforts, and (3) described with adequate specificity to preclude the possibility that the defendant was engaging in a "fishing expedition." (*Pitchess*, *supra*, 11 Cal.3d 531, 537-538.) Evidence Code section 1045 provides that if production is warranted, the trial court must examine the personnel files in camera to determine whether they contain any relevant information.

The Evidence Code sections "carefully balance[] . . . the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) Evidence Code section 1043 protects the defendant's interests by allowing a "relatively relaxed" or "relatively low threshold" for showing good cause for discovery in order to "insure the production for inspection of all potentially relevant documents." (*City of Santa Cruz,* at pp. 83-84.) Evidence Code section 1045, on the other hand, protects the police officer's privacy interests by requiring the trial court to review the records in camera before releasing any relevant information. (*Ibid*.)

Contrary to his opening brief, in his *Pitchess* motion defendant emphasized the necessity of discovering the deputies' personnel records regarding the use of excessive force or violence incident to an arrest or other official act on the grounds that defendant claimed "he did not disobey a lawful order; that he was arrested without probable cause and that the arresting [deputies] used excessive, unreasonable and unnecessary force in carrying out the arrest." Limited to a request for evidence of claims of use of excessive force, the trial court found "no discovery information in any of those files." Our review of the sealed record of the in camera proceeding "reveals no materials so clearly pertinent to the issues raised by the *Pitchess* discovery motion [i.e., excessive force] that failure to disclose them was an abuse of *Pitchess* discretion. Accordingly, we conclude the trial court properly exercised its discretion in excluding from disclosure the personnel files of [the subject deputies]." (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

To the extent that defendant now claims that his motion also sought the discovery of information relevant to the credibility of the deputies,[4] we find that defendant failed to provide any factual scenario to justify any claim of dishonesty. The defense declaration failed to make any claim that factual observations made by the deputies were false, nor did it give any reason or basis for why the personnel records of these deputies would provide insight into their credibility. Instead, defense counsel merely asserted his belief that the credibility of the deputies would be a substantial and material issue in the case. In short,

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[4] In his declaration in support of the *Pitchess* motion, defense counsel stated, "I am informed and believe a material and substantial issue in the trial of this matter will be the character, habits, customs and credibility of the [deputies]."

defendant attempted to demonstrate good cause through mere speculation. A criminal defendant is required to do much more. (*People v. Memro* (1985) 38 Cal.3d 658, 686.) Insofar as the allegations in the declaration broadly seek any information related to the credibility of the arresting deputies, they constitute just the sort of fishing expedition prohibited by Evidence Code section 1043. (See *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1023-1025.)

Furthermore, we find any error in denying defendant's motion would have been harmless. A criminal defendant must demonstrate that the information he sought through discovery would have led to admissible evidence helpful to his defense. (*People v. Hustead* (1999) 74 Cal.App.4th 410, 418.) In this case, the deputies testified as to their actions in detaining defendant. There were independent witnesses who confirmed the actions of the deputies. The jury also heard the testimony of one witness who stated that while he was being detained in the back of the patrol car with defendant, defendant said he was going to take off when the door was opened. That same witness then observed defendant's attempt to take off, as described by the deputies. In light of this evidence, we fail to see how the credibility of the deputies was a material and substantial issue in the trial.[5] As such, the defense would not have been materially assisted by granting defendant's *Pitchess* motion. Accordingly, any error would have been harmless.

[5] Although a defense witness denied seeing anything (i.e., a flashlight) in defendant's hand, the record shows that it was dark (after 9:00 p.m. in October) and defendant was underneath the deputies whose bodies were blocking the view of any third-party witnesses.

SUFFICIENCY OF EVIDENCE

Defendant contends the evidence was insufficient to establish his conviction for assault on a peace officer with a deadly weapon. We disagree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Here, the deputies testified that defendant had a flashlight in his hand which he was using to attempt to hit Deputy Shelton. In contrast other witnesses stated that they had not seen anything in defendant's hand. However, it was dark (after 9:00 p.m. in October) and defendant was underneath the deputies whose bodies were blocking the views of the other witnesses. Although Deputy Shelton fluctuated on his description of defendant's use of the flashlight (poking versus swinging and poking) he was clear that defendant had a flashlight in his hand which he was using in an attempt to hit the deputy. Furthermore, Deputy Moore's flashlight was found at the scene of the struggle. As respondent points out, it is up to the

trier of fact, i.e., the jury, to assess the demeanor and credibility of the witnesses. (*People v. Sharp* (1994) 29 Cal.App.4th 1772, 1782, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 ["It is . . . the function of the jury to assess [the] demeanor evidence and 'draw its own conclusions' about the credibility of the witness and [the] testimony."].)

After considering the evidence in the light most favorable to the prosecution, we conclude that any rational trier of fact could have found, beyond a reasonable doubt, the essential elements of the crime of assault on a peace officer with a deadly weapon.

MOTION FOR MISTRIAL

Defendant contends that the prosecutor repeatedly committed misconduct in his closing argument. However, instead of objecting to the prosecutor's argument during his presentation, defense counsel waited until after the court gave its concluding instructions and the jury retired to begin its deliberations to move for a mistrial. According to defense counsel, the prosecutor's alleged disparaging and personal attacks upon him constituted good grounds for a mistrial to prevent the jury from punishing defendant for his counsel's remarks.[6] The trial court disagreed with defense counsel and found that the "district

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[6] "[DEFENSE COUNSEL:] Your Honor, during the closing argument, the district attorney -- this is the first closing argument where I have been personally attacked, disparaged to the extent that he was basically saying that I was making things up, and I was arguing conjecture and speculation.

"This is argument. And for him . . . to stand up there and say that I'm doing something wrong, that somehow I'm some sort of slimy defense attorney who's tossing garbage at them, disparages the entire process. It makes the jury think that the defense attorney somehow is doing something untoward, and that somehow that should reflect on my client.

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attorney was [not] attempting to personally attack [defense counsel]." The court noted that it did not find the "manner in which [the prosecutor's] argument was delivered really gave the jury the impression that he was attacking [defense counsel] personally." The court also commented that it had been the court's experience that such tactics invariably backfired on the advocate.

On appeal, defendant contends the trial court erred in denying his motion for mistrial. "[W]e review a ruling on a motion for mistrial for an abuse of discretion, and such a motion should be granted only when a party's chances of receiving a fair trial have been irreparably damaged. In turn, '"[t]he applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citation.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an

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". . . . . "And he did that on a number of occasions. He personally attacked me in this trial. . . . And I think that that is grounds for a mistrial.

"I think that he's now taken this process beyond what it should be, and he's basically made it about me and that I did something wrong. And because of that, this jury is going to

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assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.] . . .”’ [Citation.]” (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

“The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ‘“an admonition would not have cured the harm caused by the misconduct.”’ [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if ‘the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.’ [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

In this case, defense counsel objected to some, but not all, of the prosecutor’s remarks during closing argument. We will examine each one to determine whether the trial court abused its discretion in denying defendant’s motion for mistrial.

A. The First Remark.

“[PROSECUTOR]: . . . Defense counsel is telling you things so that will take your mind off the most important facts in this case. He wants you to focus on things other than the crucial evidence. And by the way, defense counsel mentioned that he was wrong on some things. Yes, he was. But he also testifies in this case.

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take that into consideration, and they are going to somehow punish my client because of what he said. And I think that’s grounds for a mistrial. I’m requesting a mistrial.”

"He stands up here, and he does demonstrations for you, like this. And he's got the flashlight in his hand, and he is going like that.

"[DEFENSE COUNSEL]: Objection, your Honor. It's argument. I'm not testifying. I'm not under oath.

"THE COURT: All right. Sustained."

Because no request for an admonition was made, defendant cannot complain that an admonition was not given. There is no showing that such a request would have been futile and the sustaining of the objection clearly implied that the argument was improper. Any misconduct by the prosecutor was thus rendered harmless in this instance.

B. The Second Remark.

"[PROSECUTOR]: What about the magic flashlight? I love that. You know, I give counsel credit. He's entertaining and funny. Everything -- he wants to make this fun for you because he wants --

"[DEFENSE COUNSEL]: I object. He doesn't need to attack me.

"THE COURT: Sustained.

"[PROSECUTOR]: I'm attacking his argument. What counsel said as being funny. That's fine."

Once again, because no request for an admonition was made, defendant cannot complain that an admonition was not given. There is no showing that such a request would have been futile and the sustaining of the objection clearly implied that the argument was improper. Any misconduct by the prosecutor was thus rendered harmless in this instance.

C. The Remaining Remarks.

Defendant lumps together the following five alleged attacks for which no objections were made.

1. The Third Remark.

"[PROSECUTOR]: . . . This defense attorney is throwing garbage in front of you, and he's hoping one of you will be fooled. Do not be fooled because it's just yarn and string and a hook. That's what it is. And if one of you is fooled, we don't get justice. That's the bottom line."

2. The Fourth Remark.

"[PROSECUTOR]: Now . . . on closing arguments defense counsel says [defendant] was being choked. You have no evidence of that. That's what I'm telling you. You have got to pay attention to what was evidence and what was defense counsel saying things wanting you to think it's evidence. Again, it's a hook with feathers and a string and yarn. Don't be fooled."

3. The Fifth Remark.

"[PROSECUTOR]: How easy is it to say that? It's easy. But you can't consider it. You can't. It's not evidence. It's garbage. It's garbage. And he wants to fool one of you. Don't be fooled. Don't be fooled."

4. The Sixth Remark.

"[PROSECUTOR:] I want to give you one more example of the way [defense counsel] put garbage in front of you. He was doing it earlier in the trial."

5. The Seventh Remark.

"[PROSECUTOR:] . . . That's how you twist somebody's words. That is how you put words in somebody's mouth. That's not about the truth. He answered his question. That's how you put words in somebody's mouth. He's good at it."

Defense counsel did not object to the above five remarks; however, he claims that his failure to do so, coupled with a request for an admonition of the jury, "would not have cured the harm caused by the repeated vile attacks. [According to defense counsel, the] bell had been rung and no amount of instruction would have undone the impression formed in the minds of jurors caused by this attack." We reject defendant's contention for the following reasons.

"It is misconduct when a prosecutor in closing argument 'denigrat[es] counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues.' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 753.) "Nevertheless, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. [Citations.]" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) "In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 978.) Here, all of the challenged remarks were fair responses to defense counsel's closing argument.

The third remark followed the prosecutor's analogy about fly-fishing. He said fly fishermen frequently see fish, sometimes big fish, swimming by without approaching the

bait on the hook. He explained that this was because the fish "have been around. They have seen garbage floating by in their pool." The prosecutor then argued, "This defense attorney is throwing garbage in front of you, and he's hoping one of you will be fooled." He encouraged the jurors to not be fooled "because it's just yarn and string and a hook." He then said that "veteran fish . . . learn to see the truth . . . . They don't go for any old piece of garbage floating by. And that's what a lot of this is." Considering defense counsel's closing argument,[7] the prosecutor's response was within the bounds of propriety.

The fourth remark concerns the prosecutor's comment about the argument that defendant was being choked by Deputy Shelton. Defense counsel had argued that because Deputy Shelton was unable to properly apply the carotid restraint, he (the deputy) was "choking off [defendant's] air."[8] Logically, the prosecutor noted there was "no evidence of that." The fifth remark was a continuation of the fourth remark wherein the prosecutor elaborated on the fact that no evidence had been presented about Deputy Shelton actually choking defendant. Despite this lack of evidence, the prosecutor pointed out that defense counsel argued "they were choking him and beating him." The prosecutor added that while it was an easy thing for defense counsel to say, the fact remains that it is not evidence, "It's garbage." "Because the focus of [the] comment was on the evidence adduced at trial, rather than on the integrity of defense counsel, it was proper." (*People v. Frye*, *supra*, 18 Cal.4th

[7] Defense counsel had argued that since Deputy Shelton was unable to properly apply the carotid restrain (which counsel described as sounding "pretty dangerous to [him]"), he was "choking off [defendant's] air." Further, defense counsel argued that the deputies were choking and beating defendant.

894, 978 [not misconduct to argue: "'. . . It's irresponsible of the defense to make that accusation against somebody who has to live in this area, without anything whatsoever to back it up.'"].)

Likewise, the sixth and seventh remarks commented on the evidence adduced at trial. The sixth remark sets the stage for the seventh remark by stating that the prosecutor is going to demonstrate another incident where defense counsel has incorrectly represented the evidence in the record. Referring to a transcript of the trial testimony, the prosecutor relayed how, during cross-examination, defense counsel asked Deputy Shelton if he had discussed defendant's performance on the field sobriety tests with Deputy Moore before putting defendant in the backseat of the patrol car. Deputy Shelton indicated that he had and defense counsel asked a few more questions. The prosecutor recounted how defense counsel then asked, "At what point did you put him in the back of the police car? Before or after the field sobriety test?" The response was "After." The prosecutor then read one of the next questions by defense counsel, "So you took [defendant], and you placed him into the back of your unit before ever discussing whether or not he passed the field sobriety test?" The prosecutor argued to the jury, "That's how you twist somebody's words."

A review of the reporter's transcript demonstrates the prosecutor was accurately quoting portions of defense counsel's cross-examination of Deputy Shelton. At the time of the questioning, the prosecutor objected to defense counsel's last question as misstating the evidence. That objection was sustained. Again, there is nothing improper about

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8 See footnote 7, *supra*.

commenting on the evidence adduced at trial. The prosecutor has the right to call attention to the merits of the case and point out where defense counsel has gone astray.

Separately and alternatively, we find no reasonable likelihood that the jury understood the prosecutor's remarks in any prejudicial way. Nonetheless, defendant also faults the prosecutor for accusing defense witnesses of lying. "Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Here, Travis admitted to having a problem with Officer Elwell, denied knowing there was a 40-ounce bottle of beer between his legs when the jeep was stopped, and laughed during the prosecutor's cross-examination. The prosecutor's accusation that Travis lied "was not improper. It was a reasonable inference based on the evidence. [Citation.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 613, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; accord, *People v. Earp* (1999) 20 Cal.4th 826, 862-863.)

Finally, defendant contends it was improper for the prosecutor to vouch for the credibility of the deputies. During closing argument, the prosecutor stated, "They [the deputies] are telling the truth, and he [defendant] swung the flashlight at [Deputy Shelton]." We agree with defendant that the remark was improper; however, defense counsel did not object to it and request a curative instruction. "[A]n admonition that the prosecutor's opinion was irrelevant would have avoided any possible prejudice. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 462.) Moreover, the jury was instructed with CALJIC Nos. 1.00 [instructions to be considered as a whole] and 1.02 [statements of counsel not

evidence]. The jurors were told they "must decide all questions of fact in this case from the evidence received in this trial and not from any other source." They were directed to apply the law as stated by the court. It is presumed the jury properly followed the court's instructions. (*People v. Bonin* (1988) 46 Cal.3d 659, 699, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th 800, 823, fn. 1.)

Based on the above, we are unable to say that the trial court abused its discretion in denying defendant's motion for mistrial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

WARD
J.